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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the petition for a writ of certiorari, we demonstrate that the court of appeals' holdings—(i) that certain aspects of respondents' claims may be brought under 28 U.S.C. 1331 notwithstanding the explicit jurisdictional bar in 42 U.S.C. 405(h); and (ii) that respondents may bypass the statutorily mandated exhaustion of administrative remedies as regards the remaining aspects of their claims—are inconsistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and add to a growing conflict among the circuits on these questions. In nevertheless opposing certiorari, respondents seriously misread the decisions in *Weinberger* v. *Salfi, supra,* and *Mathews* v. *Eldridge, supra* (compare Pet. 10-13, 17-19, 22-23, with Br. in Opp. 8-13, 20-22); fail to acknowledge that the facts of their individual claims do not even fit the theory on which they seek to

defend the judgment below (see Pet. 19-22; pages 5-6, *infra*); and largely ignore the clear conflicts among the circuits on the questions presented (compare Pet. 13-15, 16 n.12, 23-24, with Br. in Opp. 15 n.9, 22 n.14) and the substantial practical importance of those questions (see Pet. 24-26).

1. Respondents repeatedly refer (Br. in Opp. 2, 4-5, 13-14 n.8, 18-19) to the decision by the HHS Appeals Council in *In re Ferguson*, No. 126-12-3830 (Oct. 18, 1979),[1] involving claims of other individuals for payment for the BCBR surgery, as a decision that should bind the Secretary in the nationwide administration of the Medicare Program on the question whether the BCBR procedure has been shown to be safe and effective and thus is a "reasonable and necessary" medical service for which payment may be made. See 42 U.S.C. (Supp. V) 1395y(a)(1). Accordingly, respondents maintain (Br. in Opp. 2, 12, 13-14 n.8, 18-19, 20, 23) that they should not be required to "relitigate" this question by exhausting available administrative remedies on their individual claims. This argument is wholly without merit.

As an initial matter, respondents fail to point out that the Appeals Council carefully limited its decision permitting payment for BCBR in *In re Ferguson*, expressly stating that it "applie[d] only to [that] case and several related cases"; accordingly, the Appeals Council stressed that it did "not intend that this conclusion be regarded as definitive as to the issues raised" and that its decision was "not to be cited as precedent." Slip op. 23. The Appeals Council expressed its conclusion in this tentative manner because of what it regarded as the "equivocal" and "inconclusive" nature of the evidence on the efficacy of the procedure, the "lack of any pertinent regulations," and the absence of any extensive study of the procedure (*id.* at 18, 19).

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[1]We have lodged a copy of the Appeals Council's decision in *In re Ferguson* with the Clerk of this Court.

Thus, even assuming arguendo the validity of the truly novel proposition advanced by respondents (Br. in Opp. 2, 12, 13-14 & n.8, 18-19, 20, 23) that the Secretary could be collaterally estopped by a prior decision of her own Appeals Council from issuing a regulation barring payment for a particular medical procedure on the basis of her determination that the procedure had not been shown to be sufficiently safe and effective to qualify for reimbursement under the Medicare Program (cf. *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-10),[2] the tentative and non-precedential Appeals Council decision in *In re Ferguson* relied upon here plainly could not be given that collateral estoppel effect.[3] See Pet. App. 16a. Moreover, the Secretary's formal ruling barring reimbursement for BCBR now has supplied the "pertinent regulation[]" on the question of the safety and efficacy of the procedure that was lacking when the Appeals Council decided *In re Ferguson* without such guidance.

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[2]Respondents rely (Br. in Opp. 18) for their collateral estoppel argument on the first sentence of 42 U.S.C. 405(h), which provides that "[t]he findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing." The only authority respondents cite in support of their argument is *Stuckey* v. *Weinberger*, 488 F.2d 904, 909-910 (9th Cir. 1973). That case, however, applied the doctrine of res judicata, not collateral estoppel, to bar a claim by an individual for disability benefits on the ground that he had been found in prior proceedings not to be disabled. This holding plainly was required by the terms of Section 405(h), quoted above. But this principle of finality in the determination of an individual claim (see *Califano* v. *Sanders*, 430 U.S. 99 (1977)) surely does not suggest that a decision by even a single ALJ on a question of general importance under the Social Security Act must thereafter bind the Secretary in the nationwide administration of the Act, as the logic of respondents' argument would appear to require.

[3]A fortiori, the ALJ decisions referred to by respondents (Br. in Opp. 2, 18-19, 20, 23), which permitted payment for BCBR in individual cases but were never reviewed by the Appeals Council, could not estop the Secretary from promulgating the regulation.

In any event, there is no reason why respondents should not be required to present their collateral estoppel argument in the course of the administrative proceedings before presenting it to the courts, just as they must do with respect to other arguments in support of reimbursement. This would permit the ALJ and Appeals Council to conduct an inquiry into the precedential nature of the prior administrative decisions (including *In re Ferguson, supra*) that respondents contend should be given preclusive effect. Moreover, the ALJ and Appeals Council might conclude that the prior decisions should be followed as a matter of administrative stare decisis, thereby obviating any need to resolve the collateral estoppel issue. And exhaustion of administrative remedies on the collateral estoppel issue at least would assure that the court, on judicial review under 42 U.S.C. (Supp. V) 405(g), would have the benefit of the Secretary's interpretation of the Social Security Act with regard to the application of collateral estoppel in administrative proceedings. Cf. *W.R. Grace & Co.* v. *Local 759, Int'l Union of Rubber Workers*, No. 81-1314 (May 31, 1983), slip op. 7-8.

Respondents have not identified any irreparable injury that they might suffer if judicial resolution of their collateral estoppel and related due process/equal protection arguments were to await completion of the administrative process. Compare *Mathews* v. *Eldridge, supra*, 424 U.S. at 331. Nor is any such injury apparent. This Court has made clear, for example, that the mere fact that a party must assume whatever burden might be entailed in participation in administrative proceedings does not constitute irreparable injury warranting the bypassing of those proceedings in favor of immediate judicial review. See, *e.g.*, *FTC* v. *Standard Oil of California*, 449 U.S. 232, 244 (1980). Nor, contrary to respondents' suggestion (Br. in Opp. 21), does the fact that respondents might prevail in administrative

proceedings and thereby moot the issue on which judicial review now is sought warrant immediate judicial review. Indeed, one of the principal reasons to await the termination of agency proceedings is that the agency's consideration of the matter might obviate all occasion for judicial review. 449 U.S. at 244 n.11.[4]

2. Respondents contend (Br. in Opp. 2, 5-7, 8, 10-12, 14-15, 20, 23) that the October 1980 ruling by the Secretary that BCBR is not a "reasonable and necessary" medical service for which payment may be made under the Act demonstrates that exhaustion of administrative remedies prior to filing this suit would have been futile. Once again, however, respondents, like the court of appeals, have chosen to ignore the fact that this ruling is irrelevant to the resolution of their individual cases.

A class was not certified in district court, and, as a result, there are only four respondents whose claims are before the Court.[5] The 1980 ruling does not apply to three of these four respondents, because they had their BCBR surgery before the ruling was promulgated. See Pet. 20-21. The fourth respondent, Freeman Ringer, had not had BCBR surgery when this action was filed, and thus had not even satisfied the non-waivable jurisdictional prerequisite of filing a claim for payment. *Mathews* v. *Eldridge, supra*, 424 U.S. at 330;

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[4]Respondents' extensive reliance (Br. in Opp. 2-3, 15, 19, 23-24) on *Jones* v. *Califano*, 576 F.2d 12 (2d Cir. 1978), which predated this Court's decision in *FTC* v. *Standard Oil of California, supra*, therefore is misplaced.

[5]Dr. Winter, who performed the surgery for virtually all of the Medicare beneficiaries for whom reimbursement was sought, also was a plaintiff in district court and is a respondent in this Court. However, respondents do not contend that Dr. Winter has standing in his own right to challenge HHS's policy regarding the payment of hospitals under Part A of the Act for their expenses in connection with BCBR surgery.

Schweiker v. *Hansen*, 450 U.S. 785, 790 (1981).[6] No question of exhaustion of administrative remedies therefore was raised by Ringer's claim. Respondents' reliance on the 1980 ruling to excuse exhaustion of administrative remedies on their individual claims accordingly is wholly misplaced. This fact vividly underscores the importance of adhering to the explicit exhaustion requirement in 42 U.S.C. (Supp. V) 405(g) and 42 U.S.C. 405 (h) even where a court might believe, perhaps on the basis of an erroneous understanding of the facts or governing procedures, that pursuit of the claims at the administrative level would be futile.

In any event, administrative procedures may not be circumvented in this case even if respondents were subject to the 1980 ruling. Full exhaustion of administrative remedies may be excused in only two narrow situations: where the Secretary has concluded that further administrative proceedings are not necessary, and where the claimant's interest in having a prompt resolution is so great that deference to the Secretary's judgment that further exhaustion should be required is inappropriate. *Weinberger* v. *Salfi, supra*, 422 U.S. at 766-767; *Mathews* v. *Eldridge, supra*, 424 U.S. at 330, 332. As we explain in the certiorari petition (at 17-23), it is clear that neither exception applies here.

Contrary to respondents' contention (Br. in Opp. 8, 10 12, 16), this Court's decision in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), does not suggest a different result. The Court there simply concluded that the case was covered by the exception to the exhaustion requirement recognized in *Weinberger* v. *Salfi, supra*. The Court relied on three stipulations by the Secretary in district court: that no facts were

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[6]The administrative and judicial review process must be invoked by the submission of a claim for benefits for services already furnished. See 42 U.S.C. 1395ff(b); 42 U.S.C. (& Supp. V) 1395f(a); 42 U.S.C. (Supp. V) 405(b); 42 C.F.R. 405.1662-405.1667.

in dispute, that the case was ripe for disposition by summary judgment, and that the only issue to be decided was the constitutionality of the statutory provision under which the claimant was denied benefits—an issue, the Court noted, that was "beyond the Secretary's competence." 426 U.S. at 76-77 & n.11. These stipulations, the Court concluded, were "tantamount to * * * a waiver of the exhaustion requirements." *Id.* at 77.

Here, by contrast, the central issue is whether a particular medical procedure is "reasonable and necessary" and thus qualifies for reimbursement under the Medicare Act. This question not only is within the Secretary's competence; it is specifically entrusted to her for determination. 42 U.S.C. 1395ff(a). Moreover, whether a given procedure is "reasonable and necessary," unlike the constitutional issue involved in *Mathews* v. *Diaz*, depends on factual determinations that may be related to other issues in the case and that therefore are most appropriately considered by a court after the Secretary has rendered a "final decision" on all aspects of the particular claim. See *Smith* v. *Schweiker*, No. 82-6272 (2d Cir. June 1, 1983), slip op. 9. If the claimant wishes to challenge the factual premises of a rule of general applicability denying payment for the procedure, any evidentiary submissions deemed relevant for this purpose must be presented in the administrative proceedings.

3. Apparently recognizing the weakness of their legal arguments, respondents suggest that circumvention of the administrative process nevertheless should be permitted in this case because the issues involve matters of "life and death" (Br. in Opp. 14; see also *id.* at 7). This contention, too, is simply wrong. As an initial matter, respondents concede (Br. in Opp. 3 n.2) that BCBR does not cure pulmonary disease but only treats its symptoms. Moreover, the question of exhaustion of administrative remedies arises

only *after* a person has satisfied the jurisdictional prerequisite of filing a claim for benefits. Because an individual cannot file a claim for benefits for BCBR unless he already has undergone the surgery (see note 6, *supra*), adherence to the normal exhaustion requirements obviously will not result in postponement of the surgery and resulting injury to the claimant. By the same token, an individual who has not yet had the surgery has no right to institute administrative proceedings for a determination whether the surgery would be covered by Medicare if he were to undergo it. The requirement of exhaustion of remedies *after* the institution of these proceedings therefore cannot be said to injure these individuals.

4. Respondents' effort (Br. in Opp. 19-22) to support the court of appeals' assumption of jurisdiction over the case under 28 U.S.C. 1331, notwithstanding the jurisdictional bar in 42 U.S.C. 405(h), also is wholly unavailing. As we have explained in the certiorari petition (at 10-13), this Court held in *Weinberger* v. *Salfi* that a suit challenging a *statutory prohibition* against the payment of benefits in a category of cases could not be brought under 28 U.S.C. 1331. A fortiori, a challenge to an *administrative ruling* barring payment in a category of cases likewise cannot be brought under 28 U.S.C. 1331.

Respondents seek to avoid this conclusion by arguing (Br. in Opp. 20-22) that they are not actually seeking to recover on a claim for benefits. This argument is spurious. It is clear beyond serious dispute that the purpose of this suit is to invalidate the Secretary's ruling that bars payment for BCBR so that respondents can secure reimbursment for the surgery. In conflict with the decision below, other courts of appeals have recognized that a judicial action seeking to invalidate a rule that limits or bars reimbursement in administrative proceedings falls within the jurisdictional bar in 42 U.S.C. 405(h) against bringing an action under 28 U.S.C.

1331 to recover on a claim arising under the Social Security Act. See Pet. 13-14.[7] That circuit conflict should be resolved by this Court.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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[7]We also note that another panel of the Ninth Circuit "reluctantly" followed the decision below in finding mandamus jurisdiction under 28 U.S.C. 1361 over a "procedural" claim arising under the Social Security Act. See *Powderly* v. *Schweiker*, 704 F.2d 1092, 1095 (1983).

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